IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 864 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? - to all Courts taking up Criminal cases in Gujarat.

AAMED @ KALU ABDULBHAI

Versus

STATE OF GUJARAT

Appearance:
MR PM THAKKAR for appellants
MR KP RAVAL APP for Respondent

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.M.KAPADIA

Date of decision: 18/11/98

ORAL JUDGEMENT (Per J.N. Bhatt, J.)

1. The imprisonment of life imposed upon the appellant No.1 - Aamad alias Kalu Abdulbhai Majothi and appellant No.2 - Akbar Abdulbhai Majothi/ original accused Nos.1 and 2 ("A-1 and A-2", for short, respectively), on being found guilty for having committed

offences punishable under Section 302 and Section 504, read with Section 114 of Indian Penal Code ('IPC' for short) and also under Section 37 (1) read with Section 135 of the Bombay Police Act, 1951 ('the Act' for short), by learned Additional Sessions Judge, Rajkot, in Sessions Case No. 82 of 1990, by judgment and order passed on 30.9.1991, is in the focus in this appeal under Section 374 (2) of the Criminal Procedure Code, 1973 ('Cr.PC' for short).

2. A short spectrum of material facts arising from the prosecution case, needs articulation, so as to appreciate the merits of the appeal at the instance of the original accused and challenge by the respondent State.

3. Original accused Nos.1 and 2 are brothers and they are also brothers-in-law of the elder brother of deceased Kasam Osman Majothi. The incident in question occurred, on 22.8.1990, between 10.30 A.M. to 11 A.M., near Street No.4, Ranchhodnagar Society, near Dhiraj Pan House, on Kuwadwa Road, near City of Rajkot. One prosecution witness, Jummabhai Noormohmed Majothi, is the complainant, who reached Rajkot alongwith relative of deceased Kasam, on 21.8.1990. The complainant, Jummabhai and deceased Kasam stayed at the residence of one Abdulbhai.

4. On the next day, i.e., 22.8.1990, at about 9.30 A.M., the complainant, alongwith the deceased, halted at the office of "Maha Gujarat Transport Company" which was enroute to the office of "Kailash Transport". The deceased had communicated with some persons in the office of Maha Gujarat Transport Company. At about 10.30 A.M. on the same day, both the accused persons came there in a rickshaw and called deceased Kasam outside the said office and started quarrelling with the deceased. The accused persons asked the deceased to accompany them in a rickshaw to which the deceased agreed. The complainant and both the accused persons, after sitting in the rickshaw, when reached near the scene of offence, A-2 Akbar dealt a knife blow on the waist of the deceased, below the neck, and A-2, Kalu, also gave a blow with the help of a knife, which is mentioned as "Gupti", on the person of the deceased. The deceased was profusely bleeding and sustained serious injuries and, therefore, he was shifted to Civil Hospital, Rajkot, by the complainant.

5. The prosecution has also ascribed the motive for the commission of the crime in question. In that, it was

alleged that the deceased Kasam had given slaps to his brother's wife, Zarina, and, therefore, there was animosity. However, an amicable settlement was reached between the deceased Kasam and the brothers of Zarina, who are the accused persons. In short, it is the prosecution case that since the deceased Kasam had beaten Zarina, the accused persons, who are her brothers, entertained an animus to take vengeance, which, according to the prosecution, culminated into homicidal death of deceased Kasam.

6. Upon the complaint produced, at Ex.42, the offence came to be registered and the investigation was carried out. Upon conclusion of the investigation, charge-sheet followed and after the committal, the Sessions Court, a charge, at Ex.1 came to be framed against the accused persons on 26.4.1991 in Sessions Case No. 82 of 1990 for the offences punishable under Sections 302 and 504 read with Section 114 of IPC and also under Section 37 (1) read with Section 135 of the Bombay Police Act, 1951.

7. To justify the charge against the accused persons, prosecution placed reliance on 17 witnesses and also on the documentary evidence to which reference will be made by us as and when required hereinafter, at an appropriate stage. The trial Court, after evaluating the evidence, the factual scenario, defence of the accused persons and the rival submissions, convicted the accused persons for the offences with which they were charged and sentenced them to suffer rigorous imprisonment for life without recording separate sentence for the offences under Section 37 (1) read with Section 135 of the Bombay Police Act and without recording any sentence for the offence under Section 504 of IPC, by its judgment and order dated 30.9.1991, which is, precisely, under challenge before us in this appeal, at the instance of the original accused persons.

8. Before we examine the merits of the rival contentions raised before us, in extenso, let us have a look at the defence propounded before the trial Court.

9. According to the defence strategy, the accused persons were called by deceased Kasam between 9.30 A.M. to 10 A.M., on the day of the incident, near the office of Maha Gujarat Transport Company, situated, at Kuwadwa Road, near the City of Rajkot, for the purpose of settlement of the dispute, in consequence, whereof, they had gone in a rickshaw. Having seen the deceased Kasam crossing the road, they halted near Dhiraj Pan House.

After initial conversation, there was talks for compromise of family discord, followed by heated exchange of words because of which heat was generated and they went into a shop, wherein, tyre tube repairs, puncture, etc., had been done. After having gone inside the said shop, popularly known as "Tyrewala shop", there was a scuffle, in the course of which deceased Kasam took out a knife. Therefore, A-2 picked up a weapon used for soldering tyres from the tube and started wielding for self-defence. However, the owner of the tyre repairing shop pushed them out from the shop. Thereafter, deceased Kasam ran after the accused persons and inflicted one knife blow on the person of A-2, Akbar, resulting into serious injury to him. Thereafter the accused persons went for treatment and could not say what transpired thereafter. It is the pith and substance of the defence propounded by the accused persons in the course of trial, before the trial Court. The trial Court expressed its inability to recognise the plea of private defence and acknowledged the proposition of the prosecution case. Therefore, the impugned judgment and order.

10. Learned advocate for the appellants/ original accused persons, in defence, has canvased following points before us in the course of his marathon submissions:

(i) That the prosecution has not been able to prove the culpability in criminology charged against the accused persons beyond reasonable doubt,

(ii) That the contradictions in the evidence of eye witnesses and the vague narration of the statement of the deceased before the Executive Magistrate in his dying declaration, would not justify the impugned judgment and order of conviction and sentence'

(iii) That the prosecution has to establish its case beyond reasonable doubt notwithstanding the specific plea raised, as a defence strategy, in the course of further statement under Section 313 of the Cr.PC.

(iv) That the prosecution case fails on account of non-explanation of injuries sustained by the accused persons.

(v) That in the alternative, the nature of offence, even if it is held to be proved against the accused persons, would not fall, in any case,

under Section 302 of IPC and at the best it would fall within the ambit of Section 304 Part II of the IPC.

11. The aforesaid submissions are controverted by learned Additional Public Prosecutor, who has, fully, supported the impugned judgment and order, inter alia, raising following further contentions:

(1) That the evidence of the complainant is quite reliable and is compatible with the main story of the prosecution.

(2) That the dying declaration before the in-charge police constable at Civil Hospital, Rajkot, culminating into the intimation to the police station by him immediately after the deceased was brought to the hospital in an injured condition, is not only the recognizable First Information Report under Section 154 of Cr.PC. but is also a dependable first declaration of the deceased, being a dying declaration.

(3) That the contradictions highlighted by the defence are at minor level and would not, in any case, dislodge the central theme of the prosecution case.

(4) That the dying declaration recorded by the Executive Magistrate and produced, at Ex.39, as it answers all requisite and material components of the provisions of Section 32 (1) of the Evidence Act, could be founded the basis for conviction.

(5) That the prosecution has, successfully, accounted and explained the injuries sustained by the deceased.

(6) That the evidence of hostile witnesses cannot be thrown overboard in its entirety and, therefore, evidence of prosecution witness, Dawood Hasam, Ex.44, driver of the rickshaw in which the injured Kasam was shifted from the venue of the offence to the hospital, cannot be ignored, as the injuries sustained by the accused persons have been explained.

(7) That the evidence of the complainant and the eye witness Govind Arjan also support and corroborate the prosecution main theme. Therefore, the

impugned judgment and order of the trial Court does not warrant interference of this Court.

12. Since the aforesaid rival contentions and submissions are interlinked and inter-dependable and with a view to avoid repetition of the narration of the evidence, we propose to deal with and discuss the same simultaneously.

13. The following facts which have remained unimpeachable from the record of the prosecution case, may be highlighted at this juncture:

(i) Accused persons are real brothers and they are brothrs-in-law of the elder brother of deceased Kasam.

(ii) Deceased and the accused persons were working as drivers.

(iii) The main incident preceded by a quarrel culminating into family discord due to slapping by the deceased Kasam to Zarina, the sister of the accused persons, which, of course, was conciliated upon and settled.

(iv) Deceased Kasam has died a homicidal death. He had sustained in all five injuries on his person out of which two injuries were grievous and inflictable by sharp cutting instrument like knife. Of course, remaining three injuries were minor in nature, in view of the medical evidence of P.W.1, Dr. Parsottambhai Meghjibhai, who was working as a Medical Officer, at the relevant time in the Civil Hospital, Rajkot City.

(v) P.W.1, Dr. Parsottambhai Meghjibhai, was examined, at Ex.31, in whose evidence the post mortem report is produced and proved, at Ex.32. There were five external injuries and three internal injuries as per the post mortem report. The grievous injuries sustained by the deceased were possible by sharp cutting instrument like knife or "Gupti".

(vi) The cause of death of deceased Kasam was traumatic shock due to massive intra-abdominal haemorrhage after sustaining injuries to vital organs like (i) left kidney, (ii) renal vessels, (iii) mesentera, (iv) small intestine, (v) colon and (vi) stomach. Thus, as per the medical evidence, vital parts of the body of the deceased

had sustained grievous injuries which culminated into homicidal death of deceased Kasam.

(vii) A-1, Kalu, had sustained two injuries. He was examined at about 10.30 A.M. in the Civil Hospital, Rajkot, by P.W.2, Dr. Ashok S. Mehta, at Ex.33. As per medical certificate, A-1, Kalu, had sustained following injuries:

(i) Linear Sup. abrasion 4" long below left shoulder.

(ii) Sup. abrasion 1/2" x 1/2" on the base of left thumb.

(viii) A-2, Akbar, had also sustained injuries. P.W.3, Dr.Bharat H. Trivedi, who was examined, at Ex.35, had examined A-2, Akbar, on 22.8.1990, at about 2.55 P.M. in Civil Hospital, Rajkot, and noted following injuries:

(i) Incised wound 1" x 1/2" on left shoulder, oblique.

(ii) Stitched wound 1" on chin.

(iii) Linear of 4" on lower lip with swelling.

(ix) That P.W. 7, Dawoodbhai Hasambhai, Ex.44, was the driver of the rickshaw in which, immediately, after the incident, in a blood stained and wounded condition, deceased Kasam was shifted alongwith the complainant Jummabhai Noormohmad, to the Civil Hospital, at Rajkot.

(x) The in-charge police constable of Civil Hospital Police Chowki, Maganbhai Nanjibhai, P.W.9, Ex.50, was informed by the Medical Officer, Civil Hospital, Rajkot, about the admission of injured Kasam in emergency ward and he recorded the information given by injured Kasam in the police station diary which is, as such, a dying declaration, and the same is produced, at Ex.51, and the intimation whereof was communicated to "B" Division Police Station, Rajkot. A copy of the police station diary entry No.13 of 1991, recorded by the PSO, "B" Division Police Station, Rajkot, is produced, at Ex.64. A copy of the police station diary is produced, at Ex.66.

(xi) Pursuant to the request of the investigating officer, after recording the offence against the accused persons, the Executive Magistrate, P.W.4, V.B. Vasoya, who was examined, at Ex.37, recorded the dying declaration of injured Kasam

between 1.40 P.M.on 22.8.1990.

(xii) A-2, Akbar, had also lodged a complaint against the deceased which was produced, at mark 10/35.

(xiii) That the discovery of weapon known as "Gupti" (muddamal article No.10) by accused No.1, Kalu, was made after drawing a panchnama in that behalf. The said weapon was discovered from the District Garden. Of course, both the panchas have turned hostile. Therefore, it is proved in the evidence of the investigating officer. The Muddamal Article No.7, knife, was recovered from the accused No.2, Akbar, at the time of his arrest.

(xiv) Reports of Forensic Science Laboratory are produced, at Ex.29 and serological report is produced, at Ex.30. It is found from the said reports that blade portion of each weapon, on both sides, was found tainted with human blood in 3 1/2 cm. part.

14. Since homicidal death of deceased Kasam has been, unquestionably and unimpeachably, established, next it would lead us to examine and appreciate who are the authors of the crime of homicide. The trial Court, upon analysis and appraisal of the evidence, has, unequivocally, held that the authors of the culpable homicide of deceased Kasam are the accused and only the accused persons, without any doubt, which is, seriously, criticised by the defence. Although the defence of the accused persons is of exercise of right of private defence, the prosecution is obliged to prove its case beyond reasonable doubt. Weakness of the defence strategy cannot augment the strength of the prosecution case. It is for the prosecution to prove the culpability of the accused persons beyond reasonable doubt. We are, therefore, in complete agreement with the submission on this proposition. However, the irresistible proposition from the entire records would emerge is that the accused persons were present and there was exchange of hot words followed by a fight which culminated into the, unfortunate, demise of deceased Kasam. The prosecution witness, complainant, Jummabhai Noormohmed, examined at Ex.41, has in clear terms testified that the main incident had preceded slapping of Zarina by deceased Kasam and, therefore, there was quarrel between the accused persons, who are brothers-in-law of the elder brother of the deceased, and the deceased Kasam. He has also supported the prosecution case about infliction of

blow by the accused persons. He had gone to police station for lodging complaint immediately after the incident. The complaint is produced, at Ex.42. Thus, the complaint was lodged with utmost promptitude and without loss of any time. Evidence of the complainant is criticised, being contradictory, to which we plead our inability to agree. There are minor contradictions, but the main theme of the prosecution case is that the accused persons, who are armed with sharp cutting instruments like "Gupti" and knife, had used the same and caused such injuries on the deceased Kasam, which culminated into his homicidal death. The main anxiety while scrutinising the evidence is to find out as to whether the main theme of the prosecution is established to the hilt or not. A few minor contradictions here and there for variety of reasons, including delay in recording evidence after the incident, are as such inconsequential and insufficient to discard the testimony of the complainant, Jummabhai Noormohmad. Therefore, the criticism and the resultant submission that the evidence of the complainant does not help the prosecution, is not acceptable. No doubt, because of relationship with both the parties, the complainant had difficult and delicate situation. Nonetheless, in so far as the main theme of the prosecution case is concerned, the complainant's testimony has remained unshaken.

15. The complaint lodged by the complainant, P.W.5, Jummabhai Noormohmad, is produced, at Ex.42. It was lodged at the earliest point of time, without any delay. The complaint came to be recorded, at about 1.30 P.M., whereas, the oral dying declaration was recorded prior in point of time, in the police station diary, by P.W.9, Maganbhai, examined, at Ex.50, who was incharge of the police chowki in the Civil Hospital, at Rajkot, at the relevant time and who was summoned by the Medical Officer immediately on admission of the deceased Kasam in an injured condition in the emergency ward, in Civil Hospital, Rajkot. Maganbhai Nanjibhai went to the emergency ward at about 11.25 A.M. on the same day pursuant to the request of the medical officer and on making inquiry from the injured Kasam, he narrated the incident which was noted down by P.W.9, Maganbhai Nanjibhai, in the police station diary and it was communicated to "B" Division Police Station, Rajkot. The statement of the injured Kasam recorded at about 11.25 A.M. on the same day, by Maganbhai Nanji, who was examined at Ex.50, is, as such, a dying declaration, and the same is produced at Ex.51. This answers all the material conditions of the provisions of Section 154 of the Cr.PC. The trial Court, therefore, ought to have

considered, Ex.51, being first in point of time, as information about commission of a cognizable case. In our opinion, therefore, Ex.42, the complaint recorded at about 1.30 P.M. on the same day, as narrated by the complainant, P.W.5, Jummabhai Noormohmad, cannot be characterised as First Information Report under Section 154 of the Cr.PC. We, therefore, find much substance in the contention propounded by learned Additional Public Prosecutor, Mr. Raval.

16. Ex.51, a note, as narrated by the deceased, would, obviously, become a dying declaration in view of the clear provisions of sub-section (1) to Section 32 of the Evidence Act, though it is the First Information Report under Section 154 of Cr.PC. It is a statement of deceased Kasam as to the cause of his death, or, at the best, as to on what circumstances a major mishap or episode which resulted into his death, took place. Therefore, such a statement of the deceased is a relevant evidence. Though hear-say evidence, untested and unsworn, it is a material evidence in the armoury of the prosecution under Section 32 (1) of the Evidence Act. So is the case of the statement recorded by Executive Magistrate, P.W.4, V.B. Vasoya, who is examined, at Ex.37. He was summoned by the police for recording dying declaration. Being Executive Magistrate, immediately he rushed to the hospital and after observing necessary formalities and procedure, recorded the dying declaration of deceased Kasam, which is produced, at Ex.40. Both the dying declarations, produced at Ex.51 and Ex.40, recorded by police constable Maganbhai and Executive Magistrate respectively, unequivocally, connect the accused persons with the authorship and the complicity which resulted into death of Kasam.

17. Now the question which would emerge for our consideration, at this stage, would be whether the aforesaid two dying declarations are acceptable and dependable. After having assessed the evidence of the prosecution and considering relevant proposition of law with regard to dying declaration, we are of the clear opinion that both the dying declarations are trustworthy and dependable. It is a settled proposition of law that conviction can be founded even on the sole dying declaration of the deceased, if it is, successfully, noticed to be voluntary, true, unprompted and natural version of the deceased with regard to the incident which resulted into his death. We are satisfied from the record of the present case that statement recorded by the Executive Magistrate, which is in question and answer form, is a natural and true version of the deceased, who

was mentally fit to make statement with regard to the incident. The Executive Magistrate is an independent person against whom no allegation is levelled. From the record of the present case, we find that the Executive Magistrate started recording the dying declaration of the injured Kasam, after the Medical Officer in-charge put his signature as a token of certifying the mental condition and fitness of the injured to make statement, and the dying declaration recorded by the Executive Magistrate, as narrated by the injured, is true and natural version of the deceased. Both the dying declarations are completely compatible and in accordance with the prosecution case.

18. Needless to emphasis that dying declarations need not be in a detailed and meticulous form of a regular statement. There is no prescribed form of recording the same. The main anxiety of the Court, while assessing the dying declaration, is to see that the version emanates from the dying declaration is unprompted, untutored, voluntary, rational and reasonable statement of the deceased and relatable to the circumstances which resulted into final voyage of his life. The relevance of dying declaration, though, of course, is an unsworn, uncouched, untested one, is only because of the fact that it is made by a man who is sinking. The fast approaching death lends authenticity to such statement.

19. After having taken into consideration the relevant and dependable two dying declarations with regard to authorship of the crime, coupled with the evidence of complainant, P.W.5, Jummabhai Noormohmad, at Ex.41, evidence of eye witness, P.W.6, Govind Arjan, at Ex.43, and the medical record proved and the reports of Forensic Science Laboratory, we have no hesitation in finding that the accused persons and nobody else were the authors of the complicity charged against them in so far as the homicidal death of deceased Kasam is concerned.

20. The prosecution has, successfully, beyond reasonable doubt, established that the accused persons inflicted knife blow and Gupti blow on the person of deceased Kasam which resulted into profuse bleeding due to cutting of left kidney, renal vessels, mesenteras, small intestine, colon and stomach of deceased Kasam and that caused not only traumatic shock but massive intra-abdominal haemorrhage resulting into death of deceased Kasam. Uninfluenced by the plea recorded in the further statement by the accused as defence strategy, we have, successfully, found from the appraisal of the evidence on record that the plea of private defence

propounded by the accused persons in further statement under Section 313 of Cr.PC. is not only not proved but is disproved by the proved factual scenario. It is a settled position of law that the person who raises the plea or propounds recourse to any one of the exceptions, is obliged to prove the same. Section 105 of the Evidence Act makes it clear that the burden of proof that the case of the accused falls within an exception is on the accused. The plea of private defence, therefore, must be proved by the accused. Section 105 of the Evidence Act reads as under:

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

21. It can be very well visualized from the provisions of Section 105 of the Evidence Act that it contains two kinds of burden on the accused who sets up an exception, firstly, there is the onus laid down of proving the existence of circumstances "bringing the case within any of the General Exceptions in the Indian Penal Code, or, within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence"; and, secondly, there is the burden of introducing or showing evidence which results from the last part of the provision which says that "the Court shall presume the absence of such circumstances". The net effect of Section 105 of the Evidence Act would be that the Court must start by assuming that no facts exist which could be taken into consideration for considering the plea of self-defence as an exception to the criminal liability which would otherwise be there. No doubt, it is true, the burden resulting from the obligatory presumption is not difficult to discharge. The accused even if he fails to discharge his duty, fully, by establishing the existence of an exception may yet get the benefit of the exception indirectly when the prosecution fails in its duty to eliminate genuine doubt about his guilt introduced by the accused. The plea of private defence propounded before the trial Court is, rightly, negatived.

22. An important observation in relation to the interpretation of appreciation of the provisions of

Sections 3, 101-104 and 105 of the Evidence Act, 1872, made in a celebrated decision of the Apex Court in Vijayee Singh v. State of U.P., AIR 1990 SC 1459 will be very pertinent and it reinforces the view which we have taken hereinbefore. It is, therefore, settled proposition of law that though the phrase "burden of proof" is not statutorily defined, it is an accepted principle of criminal jurisprudence that the burden is always on the prosecution and never shifts. This flows from the cardinal and celebrated principle that the accused is presumed to be innocent unless proved guilty by the prosecution and the accused is entitled to the benefit of every reasonable doubt. The general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the cases covered by Section 105 of the Evidence Act the prosecution is not absolved of its duty of discharging the burden. The accused, may, raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtainable in the case. He may adduce evidence in support of his plea directly or rely on the prosecution case itself or he mays indirectly introduce such circumstances by way of cross-examination and also rely on the probabilities and other circumstances. Then the initial presumption against the accused regarding the non-existence of the circumstances in favour of his plea gets displaced and on an examination of the material, if a reasonable doubt arises, the benefit of it should go to the accused. The accused can also discharge the burden under Section 105 of the Evidence Act by preponderance of probabilities in favour of his plea. In case of general exceptions, special exceptions, provisos contained in the Indian Penal Code or in any law defining the expression 'offence', accused can get benefit even from the prosecution material. The degree of proof to establish the complicity of the accused beyond reasonable doubt on the prosecution is not the same degree or standard or quality required in case of proof of plea to any one of the exceptions either under the Indian Penal Code or a special exception under any other criminal law defining the expression "offence". In other words, the duty of prosecution is always to prove the guilt of the accused beyond reasonable doubt. It is neither lessened nor lightened when accused raises plea of self-defence or plea of any one of the exceptions and the case is covered under Section 105 of the Evidence Act. The burden on prosecution never shifts and this is a settled proposition of law, whereas, in case of defence version the plea of exception is not, necessarily, required to be propounded beyond reasonable doubt. It can be shown or

it may be spelt out from the preponderance of probabilities of evidence led even by the prosecution.

23. In the event of proof to the plea of any one of the exceptions covered under the Evidence Act or the IPC, the second stage would be to consider as to whether such a plea would, absolutely, absolve the accused from the culpability he has committed. The very fact that the plea of exception is raised means it is an exception to the general rule to the criminal liability and, therefore, it is an offence but not made punishable. It is, therefore, necessary to consider whether the accused would be entitled to the full benefit and is entitled to acquittal or is entitled to lesser benefit and liable for lesser offence. Of course, it is a very critical examination and assessment in so far as nature of offence is concerned. The Court, therefore, is obliged to consider as to whether the plea propounded by the defence resorting into any one of the exceptions, is recognizable for acquittal or for lesser offence and, therefore, the Court has to undertake this exercise meticulously and minutely. In the net result and the final conclusion, therefore, would be that if the Court either is satisfied from the examination of the accused and the evidence adduced by him, or from the circumstances appearing from the prosecution evidence, that the existence of circumstances bringing the case within the exception or exceptions pleaded has been proved, or upon a review of all the evidence is left in reasonable doubt whether such circumstances had existed or not, the accused in the case of a general exception is entitled to be acquitted, or, in the case of special exception, can be convicted of a minor offence.

24. The aforesaid proposition of law has been extensively explored and very well propounded by various judicial pronouncements. However, we would like to refer to following few decisions:

(I) "In K.M. Nanavati v. State of Maharashtra, 1962 Suppl.(1) SCR 567 : (AIR 1962 SC 605), it is observed that (at pp.616 and 617 of AIR):

> "In India, as it is in England, there is a presumption of innocence in favour of the accused as a general rule, and it is the duty of the prosecution to prove the guilt of the accused. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law

defining an offence, Section 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that Section the Courts shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the non-existence of such circumstances as proved till they are disproved."

(II) In Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563, it is observed (at pp.1566-67):

"It is fundamental principal of criminal jurisprudence that an accused is presumed to be innocent and therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Penal Code. The general burden never shifts and it always rests on the prosecution. But, under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the exception lies on the accused; and the Court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act, read with the definition of "shall presume" in Section 4 thereof, the Court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the Court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man". If the material placed before the Court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfied the test of "prudent man", the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the

Evidence Act, but it may raise a reasonable doubt in the mind of a Judge as regards one or other of the necessary ingredients of the offence itself. If may, for instance, raise a reasonable doubt in the mind of the Judge whether the accused had the requisite intention laid down in Section 299 of the Penal Code."

"Learned counsel for the State, however, submitted that if the view taken by the Allahabad High Court is to be accepted then it would amount to throwing the burden on the prosecution and not only to establish the guilt of the accused beyond all reasonable doubt but also that the accused is not entitled to benefit of any exception and if such a principle is laid down then Section 105 of the Evidence Act would be rendered otiose and there would be inconsistency between Section 102 and 105. This very question has been answered by the Supreme Court in Nanavati's case (AIR 1962 SC 605) and it has been held that the general burden of proving the ingredients of the offence is always on the prosecution but the burden of proving the circumstances attracting the exception lies on the accused. But the failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence and the evidence relied upon by the accused in support of his claim for the benefit of the exception though insufficient to establish the exception may be sufficient to negative one or other of the ingredients of the offence and thus throw a reasonable doubt on the essential ingredients of the offence of murder. The accused for the purpose of discharging this burden under Section 105 can rely also on the probabilities. As observed in Dahyabhai's case (AIR 1964 SC 1563) "the accused will have to rebut the presumption that such circumstances did not exist" by placing material before the Court which satisfies the standard of a prudent man and the material may consist of oral and documentary evidence, presumptions, admissions or even the prosecution evidence and the material so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act but it may raise a reasonable doubt in the mind of a Judge as regards one or other of the necessary ingredients of the offence itself. Therefore there is no

such infirmity in the view taken in the case about the scope and effect of Sections 102 and 105 of the Evidence Act."

"We have not come across any case of the Supreme Court where the ratio laid down in Parbhoo's case (AIR 1941 All 402) and which was subsequently approved by a larger Bench in Rishi Kesh Singh's case (AIR 1970 All 51) has been considered comprehensively."

(III) "However, in Behram Khurshed Pesikaka v. State of Bombay, (1955) 1 SCR 613 : (AIR 1955 SC 123) there is a specific reference to Parbhoo's case (AIR 1941 All 402) and Woolmington's case (1935 AC 462) while considering the scope and the manner of the expression 'burden of proof' in the judgment of Hon'ble Vankatarama Ayyar, J. But the learned Judge was not prepared to go into this question in an appeal under Article 136 but only noted that the Bombay High Court in Govt. of Bombay v. Sakur, AIR 1947 Bom 38 has taken a different view."

(IV) "In State of U.P. v. Ram Swarup, AIR 1974 SC 1570 a Bench consisting of M.H. Beg, J., as he then was, Y.V. Chandrachud and V.R. Krishna Iyer, JJ., while considering the right of private defence put forward by the accused to some extent went into the question of burden of proof under Section 105 and a reference is made to a decision of the larger Bench in Rishi Kesh Singh's case (AIR 1970 All 51). Chandrachud, J., who spoke for the Bench, observed thus (at p.1576):

"The judgment in Rishikesh Singh v. State, AIR 1970 All 51 explains the true nature and effect of the different types of presumptions arising under Section 105 of the Evidence Act. As stated in that judgment, while the initial presumption regarding the absence of circumstances bringing the case within an exception may be met by showing the existence of appropriate facts, the burden to establish a plea of private defence by a balance of probabilities is a more difficult burden to discharge. The judgment points out that despite this position there may be cases where, though

the plea of private defence is not established by an accused on a balance of probabilities, yet the totality of facts and circumstances may still throw a reasonable doubt on the existence of "mens rea" which normally is an essential ingredient of an offence. The present is not a case of this latter kind."

Wigmore on evidence, dealing with the "Legal Effect of a presumption" (3rd ed., Vol. IV p.289) explains:

"It must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion 'in the absence of evidence to the contrary' from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence), the presumption disappears as a rule of law".

Taylor in his "Treatise on the Law of Evidence" (12th Edn. Vol.1 page 259) points out:

"On the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burden of proof, unless shifted by legislative interference, will fall in criminal proceedings on the prosecuting party, though, to convict, he must necessarily have recourse to negative evidence. Thus, if a statute, in the direct description of an offence, and not by way of proviso (a), contain negative matter, the indictment or information must also contain a negative allegation, which must in general be supported by prima facie evidence."

It is held in Nanavati's case (AIR 1962 SC 605) that under Section 105 of the Act the Court shall presume the absence of circumstances bringing the case within any of the exceptions, i.e., the Court shall regard the non-existence of such circumstances as proved till they are disproved, but this presumption can be rebutted by the accused by introducing evidence to support his

plea of accident in the circumstances mentioned therein. This presumption may also be rebutted by admissions made or circumstances elicited from the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. Dealing with the ingredients of the offence to be proved by the prosecution and the burden to be discharged under Section 105 of the Evidence Act by the accused and a reasonable doubt that may arise on the basis of such rebuttable evidence by the accused, it is observed (at p.617):

"An illustration may bring out the meaning. The prosecution has to prove that the accused shot dead the deceased intentionally and thereby committed the offence of murder within the meaning of S.300 of the Indian Penal Code; the prosecution has to prove the ingredients of murder, and one of the ingredients of that offence is that the accused intentionally shot the deceased; the accused pleads that he shot at the deceased by accident without any intention or knowledge in the doing of a lawful act in a lawful manner by lawful means with proper care and caution; the accused against whom a p4sumption is drawn under S. 105 of the Evidence Act that the shooting was not by accident in the circumstances mentioned in S.80 of the Indian Penal Code, may adduce evidence to rebut that presumption. That evidence may not be sufficient to prove all the ingredients of S.80 of the Indian Penal Code, but may prove that the shooting was by accident or inadvertence, i.e., it was done without any intention or requisite state of mind, which is the essence of the offence, within the meaning of S.300 Indian Penal Code, or at any rate may throw a reasonable doubt on the essential ingredients of the offence of murder. In that event, though the accused failed to bring his case within the terms of S.80 of the Indian Penal Code, the Court may hold that the ingredients of the offence have not been established or that the prosecution has not made out the case against the accused. In this view it might be said that the general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the

accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence."

(V) In Dahyabhai's case, (AIR 1964 SC 1563 at p.1567) as already noted, the relevant portion reads thus:

"The evidence so placed may not be sufficient to discharge the burden under S. 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a Judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the Judge whether the accused had the requisite intention laid down in S.No. 299 of the Penal Code."

"It can be argued that the concept of 'reasonable doubt' is vague in nature and the standard of 'burden of proof' contemplated under Section 105 should be somewhat specific, therefore, it is difficult to reconcile both. But the general principles of criminal jurisprudence, namely, that the prosecution has to prove its case beyond reasonable doubt and that the accused is entitled to the benefit of a reasonable doubt, are to be borne in mind. The 'reasonable doubt' is one which occurs to a prudent and reasonable man. Section 3 while explaining the meaning of the words "proved", "disproved" and "not proved" lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man. The Section is so worded as to provide for two conditions of mind, fist, that in which a man feels absolutely certain, of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It

is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the Court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e., neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by 'a prudent man'.

There is a difference between a flimsy or fantastic plea which is to be rejected altogether. But a reasonable though incompletely proved plea which casts a genuine doubt on the prosecution version indirectly succeeds. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating, capricious, indolent, drowsy or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity to "separate the chaft from the grain". It is the doubt of a reasonable, astute and alert mind arrived at after due application of mind to every relevant circumstances of the case appearing from the evidence. It is not a doubt which occurs to a wavering mind.

Lord Denning, J., in Miller v. Minister of Pensions, (1947) 2 All ER 372 (373), while examining the degree of proof required in criminal cases stated:

"That degree is well-settled. It need not reach certainty but it must reach a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course, it is possible but not in the least probable", the case is proved beyond reasonable doubt."

Regarding the concept of benefit of reasonable doubt Lord Du Paraq. J., in another context observed thus:

"All that the principle enjoins is a reasonable scepticism, not an obdurate persistence in disbelief. It does not demand from the Judge a resolute and impenetrable incredulity. He is never required to close his mind to the truth."

At this stage we have to point out that these principles cannot be made applicable to a case where the accused sets up alibi. There the burden entirely lies on him and plea of alibi does not come within the meaning of these exceptions. Circumstances leading to alibi are within his knowledge and as provided under Section 106 of the Act he has to establish the same satisfactorily. Likewise in the cases where the statute throws special burden on the accused to disprove the existence of the ingredients of the offence, he has to discharge the burden, for example, in the cases arising under Prevention of Food Adulteration Act if the accused pleads a defence under Section 19, the burden is on him to establish the same since the warranty on which he relies is a circumstance within his knowledge. However, it may not be necessary to enumerate these kinds or cases as we are mainly concerned in this case only with the scope and application of Section 105 of the Evidence Act. WE also make it clear that the principles laid down by us are only in respect of the said provision only. As we think that it would be appropriate and useful to set out the sum and substance of the above discussions regarding the scope of Section 105 and we accordingly state the same as follows:

"The general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the case covered by S.105 the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or rely on the prosecution case itself or, as stated above, he can indirectly introduce such circumstances by way of

> cross-examination and also rely on the probabilities and the other circumstances. Then the initial presumption against the accused regarding the non-existence of the circumstances in favour of his plea gets displaced and on an examination of the material if a reasonable doubt arises the benefit of it should go to the accused. The accused can also discharge the burden under Sec. 105 by preponderance of probabilities in favour of his plea. In case of general exceptions, special exceptions, provisos contained in the Penal Code or in any law defining the offence, the Court, after due consideration of the evidence in the light of the above principles, if satisfied, would state, in the first instance, as to which exception the accused is entitled to, then see whether he would be entitled for a complete acquittal of the offence charged or would be liable for a lesser offence and convict him accordingly."

25. The nature of offence would be, obviously, the next aspect to be examined and adjudicated upon. The trial Court has found both the accused persons guilty of the offence punishable under Section 302 read with Section 114 of IPC. Alternative contention on behalf of the accused raised before us is that in the light of the facts of the present case, there is no fit case for conviction under Section 302 of IPC. The defence plea of right of private defence is, rightly, rejected by the trial Court. We are also convinced that the accused persons were not entitled to exercise right of private defence being the aggressors. However, all culpable homicides are not murder. Section 299 of IPC prescribes culpable homicide. In our opinion, in light of the facts of the present case, there is also no fit case for conviction under Section 300 of IPC, which defines murder. It can, hardly, be gainsaid that there is a slight distinction between murder and culpable homicide not amounting to murder. If the case falls under one of the exceptions to Section 300 of IPC, then in that case, it will be a case of culpable homicide not amounting to murder. The contention that in the alternative the nature of offence will be one punishable under Section 304 Part II of IPC is also not sustainable in light of the peculiar facts of the present case. In our opinion, the requirements of exception 4 to Section 300 of IPC are satisfied. Therefore, the nature of offence committed by the accused persons will be one punishable under Section 304 Part I of the IPC.

26. In order to, successfully, invoke exception 4 to Section 300 of IPC, following four requirements ought to be established:

(i) it was a sudden fight;
(ii) there was no premeditation;
(iii) the act was done in the heat of passion; and
(iv) offender had not taken any undue advantage or acted in a cruel manner.

27. From the above relevant factual scenario, following facets and aspects have remained unquestionable from the record of the present case which run, diametrically, counter to the conviction under Section 302 of IPC imposed by the trial Court and, on the contrary, would go to indicate that the case falls within the exception 4 to Section 300 of IPC:

(1) Both the accused persons have sustained injuries. A-1, Kalu, had two abrasions, whereas, A-2, Akbar, had grievous injury which required 12 stitches;
(2) The prosecution has, successfully, established the grievous injury sustained by A-2, Akbar, which is a manifestation of a fight between the deceas5fsed on one hand and the accused persons on the other;
(3) No evidence is led which would lead us to, unerringly, hold that the accused persons had a plan to do away with the deceased, apart from the trivial nature of motive;
(4) The fact that deceased was in the office of Maha Gujarat Transport Company at the relevant time on the day of the incident means that he was present in the office of the former employer. At the relevant time, admittedly, deceased was not working as a driver with Maha Gujarat Transport Company and it is noticed from the evidence that deceased Kasam was working as a driver in Kailash Transport Company.
(5) The accused persons who are brothers were aggrieved by the incidence of slapping by the deceased to Zarina, the wife of the elder brother of deceased Kasam. This dispute was sorted out and settled almost one month prior to the main incidence and this incidence appeared to be the bone of contention for which there was again conciliation on the day of the main incidence.
(6) There was a sort of scuffle or grabbling followed by hot exchange of words and abuses.
(7) It was found from the evidence of the rickshaw

driver, Dawoodbhai, P.W.7, examined at Ex.44, in his cross-examination by the prosecution, as has turned hostile, that deceased had also a knife and he was wielding the knife, probably, in an attempt to ward off the intended blow upon his anatomy by the accused persons as accused No.1 Kalu had taken out a weapon colloquially known as "Gupti", which is a sharp cutting instrument, and accused No.2, Akbar, had a knife.

(8) Each of the accused gave one blow to the deceased Kasam. Both the accused persons sustained injuries which are explained. It is, therefore, evident that during the course of conciliation and settlement of the past animosity between the accused persons and deceased, there was a quarrel followed by a fight resulting into injuries to all the three persons of varying gravity.

(9) The accused persons were the aggressors and not the defenders. The deceased appeared to be a defender and in the course of his defence, he injured both the accused persons and accused No.2, Akbar, sustained grievous injury.

(10) It is noticed from the evidence that there was no undue advantage of the situation taken by the accused so also they did act which could be said to be cruel.

(11) In essence, the meeting between the accused persons on one hand and the deceased Kasam on the other, which was commenced in a conciliatory mood, came to be transformed in a combative mind. Therefore, it cannot be concluded that there was premeditation.

(12) Each accused inflicted only one blow on the anatomy of deceased Kasam though they had sufficient opportunity to inflict many more. Therefore, they did not act in a cruel manner.

In light of the aforesaid factual reiteration from the record of the case, all the four requisite conditions to invoke and attract exception 4 to Section 300 of IPC are satisfied.

28. We may also make it clear that when the exception 4 to Section 300 of IPC is attracted, the cause of quarrel is not very relevant as it pales into insignificance. Even the number of wounds caused during the course of the incidence is, always, not a decisive and determinative factor. It is also not relevant as to who offered provocation and started the assault. In a given case, a person actuated by heat of passion, all of a sudden, being provoked, uses a handy weapon, is 'ipso

facto' a pointer of a sudden fight emerging from the heat of passion on the spot. Consequentially, both the accused inflicted one blow by the weapon used by them and the prosecution has not been able to establish, explicitly and unambiguously, as to which blow came to be proved fatal. The accused persons also sustained injuries during the course of the quarrel between them and the deceased relating to past animosity and family discord. Therefore, in our clear opinion, all the material prerequisites of exception 4 to Section 300 of IPC have been established and the accused persons, therefore, would be entitled to the benefit of exception 4 to Section 300 of IPC, more so, when they have not taken undue advantage of the situation or had not acted in a cruel manner. The net result, therefore, would be that the nature of the offence committed by the accused persons will be punishable under Section 304 Part I and not under Section 302 of IPC as held by the trial Court. Our views on the applicability and the interpretation of exception 4 to Section 300 of IPC are, materially, reinforced by the decision of the Honourable Supreme Court in the case of Surinder Kumar v. Union Territory, Chandigarh, AIR 1989 SC 1094.

29. In this case, exception 4 to Section 300 of IPC is attracted, which reads as under:

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner."

From the explanation to exception 4, it is amply clear that it is immaterial in such cases which party offers the provocation or commits the first assault. When the accused persons are entitled to invoke the provisions of exception 4 to Section 300 of IPC, it will be a case of culpable homicide and not a murder. In other words, the accused cannot be held guilty for the offence punishable under Section 302 of IPC as the nature of offence committed by them, in our opinion, is culpable homicide not amounting to murder.

30. Obviously, next it would lead us to the question of quantum of punishment. Section 304 Part I of IPC prescribes punishment for culpable homicide not amounting to murder. Maximum penalty prescribed is imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done

with the intention of causing death, or of causing such bodily injury as is likely to cause death. It is spelt out from the record and as observed hereinabove, the offence committed by both the accused persons in killing deceased Kasam is culpable homicide not amounting to murder giving benefit of exception 4 to Section 300 of IPC. In these circumstances, though there was intention to kill, it was actuated by heat of passion and sudden unpremeditated and followed by an act which cannot be characterised as cruel. Therefore, we have found the accused persons guilty for the offence punishable under Section 304 Part I of IPC. Undoubtedly, even the complicity under Section 304 Part I is serious and, ordinarily, should not be leniently dealt with unless the circumstances are otherwise.

31. Now, we must afford an opportunity of hearing to the accused on the question of quantum of punishment.

(J.N.Bhatt, J.) (A.M. Kapadia, J.)

32. In view of the statutory mandate enshrined under Section 235 (2) of the Cr.PC., we have heard the accused on the question of quantum of punishment. Learned advocate for the accused has stated that the accused desired to be heard through their lawyer. We have also heard learned Additional Public Prosecutor on the point of quantum of punishment.

33. Following points were canvassed and advanced for and on behalf of the accused:

(1) The accused persons are coming from poor strata of society.
(2) By vocation they are drivers.
(3) They have large family to maintain.
(4) They have undergone imprisonment for a spell of more than 8 years as accused persons were arrested on the very day of the incident i.e., 22.8.1990 and thereafter uptil now they are undergoing imprisonment as convict. Therefore, the period of more than 8 years imprisonment undergone by the accused should be considered as sufficient.

34. We have also heard the learned Additional Public Prosecutor on the point of quantum of punishment. He has submitted that the accused persons have committed serious offence for which the maximum punishment prescribed is

imprisonment for life. He has also contended that imposition of fine is a must as the offence committed by the accused being punishable under Section 304 Part I of IPC. He has vehemently opposed the submission canvassed on behalf of the accused that the period of imprisonment undergone may be treated as sufficient.

35. The provision of hearing the accused on the quantum of sentence introduced in the Cr.PC has also a purpose and policy behind it. At the same time, a very important facet of the criminology and penology to which we cannot be oblivious, is the victimology. Victimology is a science of sufferings and resultant compensation. The doctrine of victimology has various aspects. Victimology means, the relationship between the sufferers of the crime and the authors of the crime in which the victims have not contributed anything for the emergence of the crime. This is a case, wherein, apart from the victim whose life is cut short at a young age, a family is left behind him. Unfortunately, the doctrine of victimology has, hitherto, been a neglected segment of criminology. The parliament, therefore, in its wisdom has provided various provisions to mitigate sufferings and agonies of the victims of crimes. Under Section 357 of Cr.PC, the parliament in its wisdom, has empowered the Court to pay compensation to the victims of crime, of course, unlike many western countries where specific laws are enacted so as to, efficiently and sufficiently, compensate the victims of offences. We cannot resist our temptation of placing on record our cherished feeling that it is right and high time for the parliament to consider exclusive law for the purpose of compensation to the victims of crimes, otherwise, as we have seen in the case of Bhopal gas tragedy and mishap, thousands and thousands became victims and but for the dynamic and active interpretation and approach of the Honourable Supreme Court, victims would not have been able to receive compensation for a very long spell. It is, rightly, said about the decision of the Honourable Supreme Court in Bhopal gas tragedy, the greatest and worst corporate tragedy, that the Apex Court of the country has in its active, dynamic and progressive interpretation and measures has proved to be the guardian of all constitutional mandates and obligations and the protector of rights and led the way not as a bearer of torch light but a flood light. Be it as it may. We are at present concerned with the aforesaid provisions of Section 357 of Cr.PC which read as under:

"357.(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of

which fine forms a part, the Court may when passing judgment, order the whole or any part of the fine recovered to be applied--

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court

or Court of Sessions when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

36. The object of Section 357 is to provide compensation to the persons who are entitled to recover damages from the persons sentenced even though fine does not form part of the sentence. No doubt, it is inherent power of the Court to take into account the nature of crime, injuries suffered, justness of claim for compensation, financial capability of the accused to pay the compensation and various other circumstances for fixing the quantum of compensation. The cry raised in the case of Sarwan Singh v. State of Punjab, AIR 1978 SC 1525, almost 20 years before has, mainly, remained in the wilderness than in the realism inspite of the guidelines enacted and highlighted for providing compensation. It is also very clear from the aforesaid provisions that the amount of compensation should be substantial and an order under Section 357 of the Cr.PC. can also be made by an appellate Court. Of course, at the time of awarding the same, the Court shall take into account any sum paid by way of compensation under Section 357 of Cr.PC.

37. After having taken into consideration, dispassionately, the entire testimonial conspectus and documentary evidence emerging from the record of the present case and the rival submissions and relevant proposition of law, the accused persons are held guilty for the offence punishable under Section 304 Part I read with Section 34 of IPC or read with Section 114 instead of Section 302 read with Section 114 of IPC. Therefore, conviction under Section 302 read with Section 114 and Section 504 of IPC shall stand quashed. Conviction under Section 135 of Bombay Police Act, 1951, is confirmed.

38. Both the appellants are, therefore, sentenced to undergo R.I. for a period of eight years and to pay fine of Rs.15,000/- (Rupees fifteen thousand only) each and in default, to suffer R.I. for a further period of two years. If the amount of fine is paid, same shall be paid to the heirs and legal representatives of the deceased Kasambhai by the trial Court upon due verification and shall safeguard the interest of widow and minors appropriately.

39. Appeal is, partly, allowed accordingly.

(karan)